IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 22.02.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

S.A.No.622 of 1997

1.Narayana Reddy (deceased)
2.Madamma
3.Madappa
4.Venkatesa Reddy
5.Manjamma .. Appellant/2nd Defendant.
(Appellants 2 to 5 are
brought or record as Lrs
of the deceased Sole appellate
Vide CMP.3167/2000 dated 13.6.2000)

vs.

P.Chandra Reddy .. Respondent/Plaintiff.

Prayer: This second appeal has been preferred against the decree and Judgment dated 12.12.1996, in A.S.No.126/1996, passed by the Subordinate Judge, Hosur, reversing the decree and judgment dated 16.10.1995 in O.S.No.351/1993, on the file of the Court of the District Munsif, Thenkanikottai.

For Appellant : Mr.P.Gopalan
For Respondent : Mr.V.Raghavachari

JUDGMENT

This appeal has been preferred against the decree and judgment in A.S.No.126 of 1996 on the file of the Court of Subordinate Judge, Hosur. The plaintiff has lost his case before the trial Court but on appeal learned first appellate Court has allowed the appeal preferred by the plaintiff. Hence, the second defendant has preferred this second appeal.

2. The short facts relevant for the purpose of deciding this appeal are as follows:-

2(a) The suit is for specific performance of a contract under an agreement sale dated 1.4.1984 entered into between the plaintiff and one Bodiammal @ Latchumakka. Bodiammal had agreed to sell the plaint schedule property for a consideration of Rs.12,000/- and she had received an advance amount of Rs.7,000/- agreeing to receive the balance of sale consideration of Rs.5,000/- and execute and register the sale deed in six

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months time at the cost of the plaintiff and on the same day, she also deliver possession of the suit property to the plaintiff. The said Bodiammal also showed the original sale deed dated 31.12.1939 at the time of the of the sale agreement dated 1.4.1984 but she took back the original title deed dated 31.12.1939 promising to hand over the original of the sale deed at the time of the execution and registration of the sale deed after receiving the balance of sale consideration Rs.5,000/-.

2(b) The second defendant is the relation of the said Bodiammal @ Latchumakka. Both D2 and D1 were aware that the plaintiff is in possession of the suit property in pursuance of the sale agreement. The plaintiff is doing personal cultivation of the suit land with the help of his cousin Nanjareddy. The suit sale agreement has been executed by the said Bodiammal in the presence of attesting witnesses and scribe. The second defendant is also aware of these details as he was present at the time of the sale agreement. The plaintiff has been pressing upon the said Bodiammal to receive the balance of sale consideration Rs.5,000/- and execute and register the sale deed in his favour at his cost as per the suit sale agreement. But he has been postponing the same on acount of her ill health and also for the reasons best known to her and she has been also giving evasive replies for some time, though the plaintiff has been every ready and willing to perform his part of the contract ie., to pay the balace of sale consideration of Rs.5,000/- and have the sale deed executed and registered at this cost in his favour from her.

2(c) The said Bodiammal @ Latchumakka died during 2nd week of January 1986 in Komarnapalli Village after illness, for some time. The first defendant is the brother's son of Bodiammal's husband. D1 is also fully aware of the suit agreement in favour of the plaintiff and his possession of the suit property in pursuance of the same. Soon after the death of Bodiammal the first defendant began to lay claim to the suit property as an heir to Bodiammal and tried to interfere with the plaintiff's possession over the suit land. Similarly the 2nd defendant tried to interfere with the plaintiff's possession of the suit property and he on 22.1.1986 tried to cut the eucalyptus trees on the suit land. The plaintiff's cousin prevented the 2nd defendant from doing so and informed the plaintiff about the 2nd defendant's illegal attempts. The plaintiff thereafter came to the village and questioned the 2nd defendant about his conduct. There was no proper relied from the D2. But D2 would contend that he had taken valid sale deed from Bodiammal @ Latchumakka in respect of the suit property. The 2nd defendant has refused to show the sale deed to the plaintiff inspite of his repeated demands. Hence, the plaintiff has issued a notice dated 25.01.1986 to the defendant calling upon them to execute a registered sale deed in pursuance of the earlier sale agreement dated 1.4.1989 legally and lawfully executed by Bodiammal @ Latchumakka. The notice sent by the plaintiff was received by the 1st defendant but he has not sent any reply. But the 2nd defendant has sent a reply dated 8.2.1986 with frivolous contentions. The alleged sale deed in favour of the 2nd defendant is false and forged one. The agreement of sale

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in favour of the plaintiff is valid one and a some of Rs.7,000/- has been paid by the plaintiff and received by the said Bodiammal and only a sum of Rs.5,000/- remains to be paid by the plaintiff.

2(d) The 2nd defendant is fully aware of the sale deed entered into between the plaintiff and Bodiammal. The 1st defendant is not a bonefide purchaser for the value of the suit property. The sale deed in favour of the 2nd defendant as sham and nominal one. The 2nd defendant is a man of no means. Due to dilatory tactics adopted by Bodiammal the sale deed cannot be taken within the time stated in the agreement. The period of six months is not the essence of the contract. The plaintiff is not aware of the suit in O.S.No.473/84 between the 2nd defendant and Krishnareddy as alleged in the reply notice. The said Krishnareddy is on inimical terms with the plaintiff and not even on talking terms with the plaintiff's family even before the plaintiff's sister Nanjamma was married to Krishnareddy and her marriage with Krishnareddy was celebrated by the plaintiff's uncle Nanumanthareddy against the wish of the plaintiff's parents. It is not true to allege that his plaintiff has been instigated by Krishnareddy to create the suit agreement inspite of the sale deed in favour of the 2nd defendant.

2(e) The first defendant is the legal heir of the deceased Bodiammal @ Latchumakka. The first defendant is bound to receive the balance of sale consideration Rs.5,000/- and execute the sale deed in respect of the plaint schedule property in favour of the plaintiff. Since the 2nd defendant has taken a sale deed in his name long after the suit sale agreement with full knowledge of the same, he is also bound to jointly execute the sale deed in favour of the plaintiff along with the 1st defendant. Since the defendants are refusing to execute and register the sale deed in spite of the notice the plaintiff is forced to file this suit only to enforce the suit agreement against the defendants. The plaintiff has also deposited the balance of sale consideration Rs.5,000/- into the Court. Since the D1-Ramakrishnareddy remains exparte at the time of service of summons, and consequently died, the plaintiff has filed an application under Order 22 Rule 4(4) of CPC seeking permission to exempt him from the necessity of impleading the legal heirs of first defendant. The said application was allowed by the Court. Hence, the suit for specific performance of contract under the suit agreement dated 1.4.1984.

3. 3(a) The first defendant remains exparte. The second defendant in his written statement would contend that the suit is bad for non-joinder of necessary parties for non impleading of all the legal representatives of D1. Bodiammal @ Latchumakka, widow of Ramakrishnareddy, is stated to have executed the alleged agreement to sell is not made as a party to the suit or to the exchange of notices prior to suit. On the date of the suit she was alive. She has died after filing of the suit. She was owner of S.No.77/1 of Komarnappali village. The said land was purchased by her husband Ramareddy S/o.Dasarapalli Munireddy under the sale deed dated 31.12.1939. It was his self acquisition. After

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his death his widow Bodiammal became entitled to the property and was in legal title and physical possession till the sale in favour of the second defendant on 30.11.1984.

3(b) The allegation that Bodiammal entered into an agreement with the plaintiff to sell S.No.77/1 for a total sale consideration of Rs.12,000/- and received Rs.7,000/- on the same date and that thereafter a sum of Rs.5,000/- is to be paid at the time of registration in 6 months from 1.4.1984 is denied as false. At the time of exchange of notices Bodiammal was alive and when defendant went and inforemd her of his alleged agreement she denied it as false and said that except the sale deed to D2 she had not entered into any agreement to sell either oral or written nor had she executed any type of document regarding the same.

3(c) The sale agreement is denied as forged one. The said agreement was created only for the purpose of the suit after the execution of the sale deed in favour of D2. Bodiammal had never delivered possession to the plaintiff under the sale agreement during her live time. From the date of sale D2 is the owner of the suit property. After the registration of sale and delivery of possession in favour of D2, Krishnareddy S/o.Thimma Reddy, has married one Chinna Ammiah daughter of Puttappa. The plaintiff is the son of said Puttappa. The said Krishnareddy after the sale deed to D2 has filed a suit in O.S.No.473/84 against him. The said suit was filed after the registration of the sale deeed on 30.11.1984 in favour of D2. The said Krishnareddy has instructed his brother-in-law, the plaintiff, to initiate this civil suit.

3(d) The said Bodiammal was living in a portion of the house occupied by Thimmareaddy, father of Krishnareddy and was cooking her food and getting the lands cultivated by hired labours. Since the sone of Thimmareddy began to harass her she left the said house and began to live in the house of D2. She died in the house of D2. Bodiammal is the senior paternal uncle's wife of the defendant. The husband of Bodiammal is elder and the father of defendant Krishnareddy is younder. Hence, the allegation in the plaint that this defendant was present at the time of agreement of sale is false. The agreement of sale is forged document. The plaintiff is not in possession of the suit property in pursuance of the sale agreement. The alleged attestors and scribe are co-conspirators in creating this forged document which is not acted upon at any time nor intended to be acted upon at any point of time.

3(e) The plaintiff has no where stated as to why he did not ask for the completion of the transaction in time. Plaintiff is fully aware of the sale and then only this alleged forged agreement is created for the purpose of this suit. The alleged collusion or fraud between this defendant and Bodiammal, vendor, is denied. The sale deed was executed by due sale consideration. It is very curious to note that plaintiff who allegedly took the agreement for Rs.12,000/- is alleged to have paid

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Rs.7,000/- towards part of the sale consideration and retained only Rs.5,000/- for being paid at the time of the registration of the sale deed while the sale deed of D2 was executed by Bodiammal for a sum of Rs.5,225/-. This shows that the payment of Rs.7,000/- is a paper payment only and for Rs.5,000/- plaintiff wants to knockaway the property by the present suit. Krishnareddy, who is the plaintiff in O.S.No.473/84, and the plaintiff herein are close relatives and best friends. The registered sale deed is earlier in point of time and the agreement has been created fraudulently after the registration of the sale deed. The plaintiff has no cause of action. The suit is bad for non-joinder of necessary parties. Hence, the suit is liable to be dismissed with compensatory costs under Section 35 A of CPC.

4. On the above pleadings the learned trial Judge has framed five issued for trial. Plaintiff has examined himself as P.W.1 besides examining P.W.2 and P.W.3 on his side. Ex.A.1 to A.3 were marked on the side of the plaintiff. On the side of the defendants D.W.1 and D.W.2 were examined and Ex.D.1-sale deed dated 30.11.1984 was marked. After going through the oral and documentary evidence, the learned trial judge has dismissed the suit. Aggrieved by the findings of the learned trial judge, the plaintiffs as filed an appeal in A.S.No.126/1996 before the subordinate Judge, Hosur, who has allowed the appeal. Hence, the second appeal before this Court by the second defendant.

5. The substantial questions of law involved in this second appeal are as follows:-

i) Whether the learned Judge is right in reversing the well considered findings of the trial Judge in granting the relief of specific performance without impleading the heirs of the agreement vendor?

ii) Whether the learned Judge is right in granting the relief of specific performance without any pleading and evidence to the effect that the plaintiff is ready and willing to perform his part of the contract throughout the period?

iii) When there is a specific denial about the existence of Ex.A.1 and the execution by the agreement vendor, whether the learned Judge is right in decreeing the suit without adverting to the provisions of Section 68 of the Evidence Act.

6.The Points:-

6(a) The claim of the plaintiff is under Ex.A.1 dated 1.4.1984 which was executed by one Bodiammal in favour of the plaintiff. The second defendant claims right and title in respect of the suit proeprty under Ex.B.1-sale deed dated 30.11.1984 said to have been executed by Bodiammal. Ex.B.1 is is registered sale deed. The time stipulated under Ex.A.1 to perform the contract in terms of Ex.A.1 by the respective parties is six months. Admittedly before the expiry of the said six months stipulated under Ex.A.1. The plaintiff has not even issued any notice to Bodiammal informing that the plaintiff is always ready and willing to perform his part of the contract, demanding the said

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Bodiammal to execute the sale deed in terms of Ex.A.1-sale agreement. The said Bodiammal admittedly died on 19.1.1986. The suit was filed in the year 1987 after the death of Bodiammal.

6(b) According to the plaintiff, who is the respondent herein, he was put in possession in lieu of the execution of Ex.A.1-sale agreement on the date of agreement itself. But to show that the possession was handed over on the date of execution of Ex.A.1-sale agreement. The plaintiff has not filed any land receipts to show that he is possession and enjoyment of the plaint schedule property in lieu Ex.A.1 sale agreement. Except original evidence on both sides there is no documentary evidence let in on both sides in respect of the possession in respect of the suit property. Even in Ex.B.1-sale deed there is a recital to the effect that possession has been handedover to D2 on the date of execution of Ex.B.1-sale deed.

6(c) Section 16 of the Specific Relief Act, 1963, specifically bars a person from asking a relief under specific purformance of a contract, which runs as follows:-

> Personal bars to relief- Specific performance of a contract cannot be enforced in favour of a person-
>
> (a) who would not be entitled to recover compensation for its breach; or
>
> (b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract, or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or
>
> (c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the defendant.
>
> Explanation- For the purpose of clause (c)-
>
> (i) where a contract involves the payment of money, it is not essential for the plaintiff to actually tender to the defendant or to deposit in court any money except when so directed by the Court;
>
> (ii) the plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

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So it is clear from Section 16(c) of the Specific Relief Act, 1963, the plaintiff, who has come to the court for a relief of specific performance of a contract under Ex.A.1-sale agreement, has to prove that he was always ready and willing to perform his part of the contract.

6(d) Only at para 5 of the plaint, the plaintiff would avered that he has been pressing upon the said Bodiammal @ Lakchumakka to receive

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the balance of sale consideration of Rs.5,000/- and to execute a registered sale deed in his favour at his costs as per the suit sale agreement. Except the above said averment there is absolutely no documentary evidence produced on the side of the plaintiff to show that he was always ready and willing to perform his part of the contract. Ex.A.1 is dated 1.4.1984. Bodiammal died during second week of January, 1986. Even after the expiry of six months time stipulated under Ex.A.1, the plaintiff has not chosen to sent any notice requesting Bodiammal to execute the sale deed after receiving the balance of sale consideration in terms of Ex.A.1-sale agreement. Ex.B.1-sale agreement is dated 30.11.1984 in favour of the second defendant executed by Bodiammal. Bodiammal died nearly one year after the execution of Ex.B.1-sale deed. Ex.B.1 is a registered sale deed. So the plaintiff cannot say that he is not aware of Ex.B.1-sale deed. Ex.B.1-sale deed is for a lesser sum of Rs.5,225/- than the sale amount agreed under Ex.A.1. Since the plaintiff was ready to pay the balance of sale consideration to get the sale deed executed in his favour, Ex.B.1 has come into existence. The learned first appellate Court has failed to consider whether the plaintiff was always ready and willing to perform his part of the contract till the life time of Bodiammal. The learned first appellate Judge, at para 7 of his judgment, has discussed about the pleading in the written statement of the second defendant and has given a findings that the averments in the written statement are false. Whether the plaintiff has always ready and willing to perform his part of the contract as per section 16(c) of the Specific Relief Act, has not at all been gone into by the first appellate Court. On the other hand the trial Judge, while answering issue NO.1 at para 9, has observed that till the death of Bodiammal the plaintiff has not taken any steps for the execution of the sale deed after paying the balance of sale consideration Rs.5,000/- from Bodiammal.

6(e) Mr.V.Ragavachari, learned counsel appearing for the respondent/plaintiff relying on several decisions of the High Court as well as Apex Court, contended that the plaintiff can ignore Ex.B.1-sale deed and he is entitled to get a decree for specific performance of the contract after paying the balance of sale consideration to the heirs of Bodiammal. It is pertinent to note in this case, D1 was impleaded as a legal representative of the deceased Bodiammal. D1 is said to be the husband's brother's son of Bodiammal. But D1 also died before the trial of the suit. But it has been admitted in the plaint itself that the plaintiff has not taken any steps to implead the legal representatives of D1 since D1 himself remained exparty.

6(f) Let us now consider one by one the ratios relied on by the learned counsel appearing for the respondent/plaintiff whether those judgments will be of nay use to the plaintiff. The learned counsel for the respondent relying on AIR 2000 HIMACHAL PRADESH 53 (Shri Krishan Swarup Bhatnagar Vs. Shri Chander Mohan Rewal and another), contended that the subsequent purchaser is prevented from raising the issue that whether the plaintiff is ready and willing to perform his part of the contract. The facts of the above said dictum is that:

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" the defendant is the owner of the suit property, had got published and circulated hand bills through property dealer defendant No.2 offering sale of the suit property for Rs.3,50,000/-, in response to which the plaintiff contacted defendant No.2 and after inspecting the suit property, entered into sale agreement for consideration of Rs.4 lacks on 25.08.1933 and paid a sum of Rs.30,000/- as advance money besides Rs.2,000/- as commission/service chagers of defendant No.2. The balance amount of Rs.3,70,000/- was agreed to be paid at the time of execution of the sale deed, which was to be executed on 26.10.1993 as per the terms of the agreement. Thereafter, after obtaining permission from the Government on 14.10.1993 to purchase the suit property as required under Section 118 of the H.P.Tenancy and Land Reforms Act. The plaintiff sent a registered letter to the defendant requiring him to obtain necessary certificate udner the Income-tax Act but he refused to accept the said registered letter and informed defendant No.2 tht he was not interested in selling the selling the suit property, who in turn further informed the plaintiff the intention of the defendant.

The plaintiff gave legal notice through registered post to defendant No.1 on 22.10.1993, which was also refused by the defendant. The plaintiff made himself available in the office of the Register, Shimla, for the execution and registration of the sale deed. Bu the defendant did not turn up. Hence, the plaintiff filed the suit for specific performance on the basis of the agreement dated 25.08.1993. Even in the plaint, the plaintiff has averred that he was always ready and willing to perform his part of the contract and to pay the balance of sale consideration of Rs.3,70,000/- to the defendant and that the defendant has failed to perform his part of the contract in terms of the sale agreement dated 25.08.1993.

The defendants have filed written statement contending that another sale agreement entered into between the parties on 27.08.1993, wherein sale consideration is Rs.4 lakhs, which was corrected as Rs.7 lakhs as his conscience did not permit the evasion of stamp duty and registration fee and that the agreement dated 25.08.1993 was not a concluded and binding contract and it stood superseded and canceled by the agreement dated 27.08.1993.

It was vehemently contended by the defendant in that case that the plaintiff has failed to plea in the plaint that he was always ready and willing to perform his part of the contract. But this defence was negatived by the learned Judge of Hariyana High Court holding that there was sufficient evidence under Ex.P.4 to P.8, notices, sent by the plaintiff to the defendant requesting him to execute a sale deed and get it registered on 26.10.19393 as per the terms of the agreement dated 25.08.1993, which was repudiated by the defendant, as a result of which, the

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plaintiff is absolved from proving that he was ready and willing to perform his part of the contract.

It has been held by the learned judge that absence of an averment on the part of the plaintiff as to readiness and willingness to perform his part of the contract tantamounts to the absence of cause of action which is fatal in view of Section 16(c) of the Specific Relief Act. "

In fact the ratio relied on by the learned counsel for the respondent against the contention of the learned counsel for the respondent himself. In the ratio sited above there were two notices sent by the plaintiff wherein demanding the defendant to perform his part of the contract stating that he is always ready and willing to perform is part of the contract and also ready to deposit the entire balance of sale consideration. But in the case on hand, the plaintiff has not even sent any notice during the life time of Bodiammal stating that he is always ready and willing to perform his part of the contract and also ready to deposit the balance of sale consideration of Rs.5,000/- and demanding Bodiammal to execute sale deed in favour of the plaintiff. On the other hand he waited for nearly two years till her death to file this suit against the vendee in respect of the suit property under Ex.B.1. So the suit is clearly bared under Section 16(c) of the Specific Relief Act, 1963, since the plaintiff has miserably failed to prove that is always ready and willing to perform his part of the contract.

6(g) The learned counsel appearing for the respondent relying on 2000(6) SCC 402 (R.K.Mohammed Ubaidullah and others Vs. Hajee C.Abdul Wahab (d) by LRs. and others), contended that burden of proof is heavily on the subsequent purchaser to prove his bonefides and to show that he is a bonefied purchaser under Section 19(b) of the Specific Relief Act, 1963, for the value without notice. The short facts of the case cited above is that:

"The respondent – Plaintiff had entered into an agreement to purchase the suit property, a godown, of which he had been the tenant since about 1962. The property was own by D1. The respondent had directed access to the godown as it was located on the rear side of the premises, Door No.39, in which he ran his hardware business. Door No.39 belonged to Defendants 2-5 who were also hardware merchants carrying out their business from the adjoining respect of their business as well as residential premises. The agreement, dated 27.7.1971, stipulated that D1 was to execute the sale deed within 90 days after receiving the balance sale price (Rs.45,000/-). The respondent issued notice dated 19.9.1971 stating his readiness and willingness to perform his part of the bargain and seeking execution of the sale deed. What happened in fact was that D1 sold the property to D2 to D5 by sale deed executed and registered on 9.11.1971 for a sum of Rs.50,000/-.

Hence, the respondent filed a suit for specific performance contending that D2 to D5 had prior knowledge of the earlier

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agreement and that D1 had acted dishonestly in selling the property to them, the second sale transaction was therefore not bona fide.

Per contra, D2 to D5 contended that they were bona fide purchasers for value without notice of the earlier agreement of sale executed infavour of the respondent. They claimed that though they were aware that the respondent was a tenant of the suit premises, and had been for many years, they did not enquire as to whether he had any other interest therein. However, they claimed in their written statement that they had informed the respondent of their intention to buy the suit property from the owner.

The trial Court decreed the suit for specific performance holding that the respondent-plaintiff had always been ready and willing to perform his part of the contract and that the appellants-defendants were not bona fide purchasers without notice of the earlier agreement. On appeal, the High Court dismissed the appeal. Hence, the appellants-defendants are before the Honourable Apex Court. While dismissing the appeal, it has been held by the Honourable Apex Court as follows:-

> It is not uncommon that where a tenant is in possession of the property, that too for a long time, using it for business purpose, he would always like to purchase the property getting all advantages if it is offered for sale. Normally the landlord or owner of the property would also be interested in selling the property to a person in possession if a reasonable price is given to avoid litigation and to have smooth transaction. In such a situation the appellant purchasers would have made an inquiry with the respondent-plaintiff about the nature of his possession and title under which he is in possession on the date of sale deed executed in their favour. If they had made an inquiry the plaintiff would have certainly revealed the prior agreement in his favour. If such inquiry was not made it only means that the appellants wilfully abstained from making such inquiry or they grossly neglected to do so. The defence of appellants-D2 to D4 is not consistent with regard to contacting the plaintiff and informing him of their intention of purchase the property.
>
> Section 19(b) of the Specific Relief Act, 1963, protects the bona fide purchaser in good faith for value without notice of the original contract. This protection is in the nature of an exception tot he general rule. Hence the onus of proof of good faith is on the purchaser who takes the plea that he is in innocent purchaser. Good faith is a question of fact to be considered and decided on the facts of each case. Section 52 of the Penal Code emphasises due care and attention in relation

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to good faith. In the General Clauses Act exphasis is laid on honesty.

The facts of the above case will not be applicable t the present facts of the case because there was no pleadings in the written statement filed by D2 that he was a bone fide purchaser for value. On the other hand, the plaintiff has filed the suit for specific performance of the contract under Ex.A.1 after nearly 2 years from the date of execution of Ex.A.1-sale agreement. The plaintiff herein has not taken any steps for executing the sale deed in terms of Ex.A.1-sale agreement. Bodiammal, after one year of execution of Ex.A.1-sale agreement, has executed an sale deed to D2 in respect of the suit property under Ex.B.1. Ex.B.1 is being a registered one, the presumption regarding the notice is that the plaintiff cannot claim that he has no notice about Ex.B.1. Another pertinent point to be noted is that, as already observed by my in above paragraph, the plaintiff tile the death of Bodiammal has not challenged Ex.B.1 nor demanded Bodiammal to execute the sale deed in terms of Ex.A.1 by way of notice. Under such circumstances, the contention of the learned counsel for the respondent that D2 cannot claim the his is a bona fide purchaser under the value holds no water.

6(h) The learned counsel appearing for the respondent relying on the ratio of the Honourable Apex Court reported in AIR 1954 SC 75 (Durga Prasad and another Vs. Deep Cand and others), contended the the legal heirs of Bodiammal Viz. D1 has been impleaded in the suit and that D1 is husband's brother's son of Bodiammal and hence, the D2 cannot contend that the suit is bad for non-joinder of necessary parties. In the above said dictum at para 40 & 41 the main point for decision in that case was who is entitled to the purchase money to be paid by the plaintiff. But that is not the case herein because during the life time of Bodiammal the plaintiff has not taken any steps to pay the balance of purchase money to her directly. Only after her death the suit has been filed in the year 1987 before the District Munsif, Hosur as O.S.No.126/1987, which was later transferred to District Munsif, Thenkanikottai, and renumbers as O.S.No.351/1993. So the above dictum will not be applicable to the present facts of the case.

6(i) The other dictum relied on by the learned counsel for the respondent is 2005(12) SCC 164 (Huvappairappa Ballari Vs. Basavaand another), wherein the point for determination arose was whether under Section 100 of CPC a decree for recovery of possession could be granted to transferor against transferee. The learned counsel for the respondent relying on the above decision would contend that with reference to the impleading of heirs of the agreement vendor and whether the suit is bad for non-joinder of necessary parties cannot be agitated before this Court in second appeal by way of a substantial question of law. The first substantial question of law centers around the question whether granting of relief for specific performance by the trial Court was valid without impleading heirs of the agreement vendor. But, in fact, the legal representative of the vendor Bodiammal was impleaded as D1 and there was no substantial question of fact was raised before this Court. We need

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not even go into the question whether the suit is bad for non-joinder of necessary parties. The important substantial question posed before this Court is whether the plaintiff has performed his part of the contract as per Section 16(c) of the Specific Relief Act. So the above said dictum is also of no use to the respondent.

6(j) The same point was considered in 2005 (12) SCC 270 (Harjeet Singh and another Vs. Amrik singh and another), which is irrelevant to be gone into because there was no question raised in this appeal to the effect that this Court has gone into the facts of the case as provided under Section 100 of CPC.

6(k) Relying on 2002(3) SCC 676 (Shrimant Shamrao Suryananshi and another Vs. Pralhad Bhairoba Surayanshi (dead) by LRs. and others), the learned counsel for the respondent would contend that as per Section 53(A) of the Transfer of Property Act, 1882, the plaintiff has obtained possession in part payment of the agreement of sale. But except the evidence of both sides to the effect that the plaintiff is in possession of the suit property as well as the defendant is in possession of the suit property, there is absolutely no documentary evidence like pay of land tax receipts to show that even on the date of Ex.A.1 possession was handed over by Bodiammal to the plaintiff.

6(L) On the other hand the learned counsel for the appellant relying on 2005(5) CTC 17 (P.Panneerselvan Vs. A.Baylis), would contend that the plaintiff must succeed or fail on the strength of his own case and not on the basis of weakness of defendant's case. The learned counsel for the appellant would contend that only relying on the evidence of the pleadings in the written statement of D2 the learned first appellate Judge had allowed the appeal filed by the plaintiff without considering whether the plaintiff has proved his case through oral and documentary evidence.

6(m) The learned counsel for the appellant relied on 2003(1) CTC 355 (Arunachala Mudaliar Vs. Jayalakshmi Ammal and another), and contended that once the plaintiff has failed to prove his possession beyond any reasonable doubt then he is not entitled to any relief. The plaintiff herein has come forward with a definite case that he is in possession of the suit property, but he has not filed any documentary evidence to prove his possession. Under such circumstances, he will not entitled to a decree for specific performance of the contract.

6(n) The other decision relied on by the learned counsel for the appellant is 2004(4) MLJ 112 (Ranganatha Gounder Vs. Sahadeva Gounder and others), wherein it has been held as follows:-

> "It is settled that a person cannot claim the relief of specific performance unless he proves his readiness and willingness to perform his part of the contract. Readiness and willingness to perform includes ability to perform. It is incumbent upon the buyer to satisfy the Court that he was

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ready and willing with the money or had the capacity to pay for the property and that he had at all events made proper and reasonable preparations and arrangements for securing the purchase money.

Further, it is clear that in the case of agreement of sale relating to immovable property, time is not of the essence of the contract. At the same time, it cannot be stated that the time-limits prescribed by the parties in the agreement have no significance or value and that they mean nothing. In other words, it would not be reasonable to say that because time is not made the essence of the contract, the time-limit specified in the agreement hs no relevance and can be ignored with impunity. If the concept of time being the essence of contract is accepted in toto, it would mean denying the discretion vested in the Court by both Sections 10 and 20 of the Specific Relief Act.

In the case on hand, the defendants have not taken a plea that time is the essence of the contract. If at all such a plea is to be taken, that has to be taken only by Bodiammal. But unfortunately the plaintiff has filed the suit only after the death of Bodiammal.

6(o) It has been further held in 2005 (4) CTC 426 (A.Ulaganatha Reddy Vs. D.Nandagoppal Chetti and others), by the learned judge of this Court as follows:-

"The relief of specific performance is discretionary by not arbitrary and discretion must by exercised in accordance with the sound and reasonable judicial principles. The Court has first to consider whether the plaintiff hs established the case. His conduct during, at and from the date of contract till date of suit bears great relevance. In a case of specific performance, it is for the plaintiff to establish that the covenants in the contract are clear, cogent and fair; that he is ready and has always been ready and willing to perform his essential terms of the contract from the date of contract till date of decree. He must come to the Court with clean hands. If his conduct is tainted with falsity of the case or unworthy of acceptance, equity denies him the relief.

It is not possible or desirable to lay down the circumstances under which the Court exercise its discretion against the plaintiff. But they must be such that the representation or conduct of the plaintiff is directly responsible in making the defendant to change the position or such as to bring out the situation which would be inequitable to give the plaintiff such a relief. The Court should meticulously consider all the facts and circumstances of the case. The Court is not bound to give lawful performance merely because it is lawful to do so. The discretion has to be exercised carefully taking note of the conduct of the parties."

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Under such circumstances, I am of the firm view that the plaintiff has failed to prove that he was always ready and willing to perform his part of the contract as enunciated under Section 16(c) of the Specific Relief Act, 1963, which necessitated this Court to interfere with the judgement of the first appellate Court. Points are answered accordingly.

7. In fine, the second appeal is allowed setting aside the decree and judgment in A.S.No.126/1996 on the file of the Subordinate Judge, Hosur, with costs.

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar.

ssv

To,
1. The Subordinate Judge, Hosur.
2. The District Munsif, Thenkanikottai.
3. The Section Officer, VR Section,
High Court, Madras.
+ 1 CC To Mr.V.Raghavachari, Advocate SR NO.11196
+ 1 CC To Mr. P.Gopalan, Advocate SR NO.10670

S.A.No.622 of 1997

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Gp/11.4

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